Supreme Court, U. S.
FILED
NOV 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1316

THE RENEGOTIATION BOARD,

Petitioner,

—v.—

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CONSUMERS UNION OF UNITED STATES, INC., *AMICI CURIAE*

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

CAROL A. COWGILL
Consumers Union of
United States, Inc.
1714 Massachusetts Avenue, N.W.
Washington, D. C. 20036

MARVIN M. KARPATKIN
1345 Avenue of the Americas
New York, New York 10019

Attorneys for Amici Curiae

I N D E X

Page

Interest of Amici 1

Question Presented 3

Statute Involved 4

Statement of the Case 4

Introduction and Summary of Argument 7

Argument 11

I. THE REGIONAL BOARD AND DIVISION REPORTS ARE FINAL OPINIONS SUBJECT TO DISCLOSURE UNDER SUBSECTION (a)(2) OF THE ACT 11

A. Documents on which an agency relies in reaching a final decision must be disclosed .. 11

B. Regional Board Reports 15

C. Division Reports 16

II. REPORTS WHICH MUST BE DISCLOSED AS FINAL OPINIONS ARE NOT COVERED BY THE FIFTH EXEMPTION OF THE ACT 18

Conclusion 24

TABLE OF AUTHORITIES

Page

Cases:

American Mail Lines, Ltd. v. Gulick,
411 F.2d 696
(D.C. Cir. 1969)..... 13, 14

Boeing Airplane Company v. Coggeshall,
280 F.2d 654
(D.C. Cir. 1960)..... 19, 20

Bristol-Myers Company v. FTC,
424 F.2d 935
(D.C. Cir. 1970)..... 16, 21

Consumers Union v. Veterans Administration,
301 F. Supp. 796
(S.D.N.Y. 1969),
appeal dismissed as moot,
436 F.2d 1363
(2d. Cir. 1971)..... 3

EEOC v. Los Alamos Constructors,
___F. Supp.___ 43 L.W. 2169
(D.N.M. October 9, 1974)..... 10

Environmental Protection Agency v. Mink,
410 U.S. 73
(1973)..... 12, 18, 20, 21

Fein v. United States,
405 U.S. 365 (1972)..... 8

General Service Administration v. Benson,
415 F.2d 878
(9th Cir. 1969)..... 14

Getman v. N.L.R.B.,
450 F.2d 670
(D.C. Cir. 1971)..... 3

Page

Hawkes v. Internal Revenue Service,
467 F.2d 787
(6th Cir. 1972)..... 12

International Paper Company v. FPC,
438 F.2d 1349
(2d Cir. 1971)..... 21

Joseph v. United States,
405 U.S. 1006 (1972)..... 8

Kaiser Aluminum & Chemical Corporation v. United States,
157 F. Supp. 939
(Ct. Cl. 1958)..... 19

Montrose Chemical Corporation v. Train,
491 F.2d 63 (D.C. Cir. 1974).... 12, 16

National Labor Relations Board v. Sears, Roebuck & Company,
No. 73-1233..... 3

Soucie v. David,
448 F.2d 1067
(D.C. Cir. 1971)..... 21

Sterling Drug, Inc. v. FTC, 450 F.2d
698 (D.C. Cir. 1971).... 10, 13, 14, 22

Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D.
318 (D.D.C.), aff'd,
384 F.2d 979
(D.C. Cir. 1966),
cert. denied, 389 U.S.
952 (1967)..... 20

Stokes v. Brennan,
476 F. 2d 699
(5th Cir. 1973)..... 10, 22

Page

Tax Analysts and Advocates v. Internal Revenue Service, 362 F. Supp. 1298 (D.D.C. 1973) aff'd, ___ F.2d ___ (D.C. Cir. August 19, 1974)..... 10, 12
Tennessean Newspapers v. FHA, 464 F.2d 657 (6th Cir. 1972)..... 11, 22
United States v. Broyles, 423 F.2d 1123 (3rd Cir. 1970)..... 8
United States v. Holby, 477 F.2d 649 (2nd Cir. 1973)..... 8
United States v. Houghton, 413 F.2d 736 (9th Cir. 1969)..... 8
United States ex rel. Checkman v. Laird, 469 F.2d 773 (2d Cir. 1972).... 8
Vaughn v. Rosen, ___ F. Supp. ___ , (D.D.C. Oct. 19, 1974), on remand from 484 F.2d 820 (D.C. Cir. 1973), cert. denied, ___ U.S. ___ (March 18, 1974)..... 10, 21, 22
Washington Research Project, Inc. v. HEW, ___ F.2d ___, No. 74-1027 (D.C. Sept. 12, 1974)..... 15, 22

Page

Statutes:

5 U.S.C. § 552 ..... passim
50 U.S.C. App. § 1217(a) 24

Regulations:

32 C.F.R. § 1472.4 (1972)..... 17
39 F.R. 13650 (1974) 6

Miscellaneous:

K. Davis, Administrative Law Treatise 114, (Supp. 1970) 10
Dorsen and Shattuck, Executive Privilege, the Congress and the Courts, 35 OHIO ST. L.J. 1, 29-33 (1974) 20
House Report No. 1497, 89th Cong., 2d Sess. (1966) 19, 21
Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda, 86 HARV. L. REV. 1047 (1973) 23
Senate Report No. 813, 89th Cong., 1st Sess. (1965) 19

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1316

THE RENEGOTIATION BOARD,

Petitioner,

-v.-

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CONSUMERS UNION OF UNITED STATES, INC., AMICI CURIAE

Interest of Amici [1]

The American Civil Liberties Union is a

1/ Letters from both of the parties, consenting to the submission of this brief, have been filed with the Clerk of the Court.

nationwide, non-partisan organization of more than 250,000 members dedicated solely to the preservation of the liberties safeguarded by the Bill of Rights. During its fifty-four year existence the ACLU has been particularly concerned with the freedoms protected by the First Amendment to the Constitution, and in recent years it has represented numerous citizens requesting disclosure of information from executive agencies of the Government under the Freedom of Information Act.

The Consumers Union of United States, Inc., ("Consumers Union") is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports (magazine and TV) and other publications. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with its 2.2 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support. In connection with its product testing, publishing, and other activities, Consumers Union frequently requests information from govern-

ment agencies.2/

The public's right to know the bases and criteria for decisions made by government agencies is inherent in our system of government. The Freedom of Information Act was passed by Congress to ensure that the public would be able to know how executive agencies were discharging their functions. Amici Curiae believe that this case and its companion, National Labor Relations Board v. Sears, Roebuck & Company, No. 73-1233, present important questions concerning the reach of the Act to prevent the development of "secret law" by administrative agencies.

Question Presented

Whether the Freedom of Information Act requires public disclosure of reports relied upon by an agency in making final decisions where the agency does not issue any formal opinions explaining its decisions?

2/ The first lawsuit under the Freedom of Information Act was brought by Consumers Union to obtain hearing aid test data and scoring methodologies from the Veterans Administration. Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d. Cir. 1971). Consumers Union was also amicus curiae in Getman v. N.L.R.B., 450 F.2d 670, 673, n. 25 (D.C. Cir. 1971).

Statute Involved

The Freedom of Information Act, Title 5, U.S.C. § 552 (hereafter "the Act"), is set forth in an appendix to the petitioner's brief, at pp. 41-44.

Statement of the Case

The respondent, Grumman Aircraft Engineering Corporation (hereafter "Grumman"), commenced this action under the Act to compel the Renegotiation Board (hereafter "the Board") to disclose certain documents explaining decisions of the Board and its decision-making delegates, the Regional Boards, as to whether particular companies had accrued excess profits in their business with the government.

The suit was brought in 1968, at a time when the Board did not disclose its final opinions in any form, but merely issued decisions without explanation. Initially, the Board asserted that the requested documents contained confidential information covered by the Act's exemption for "trade secrets and commercial and financial information obtained from a person and privileged or confidential" [5 U.S.C. § 552(b)(4)]. The Court of Appeals reversed a decision by the District Court upholding the Board's claimed exemption, and remanded the case for a determination of what documents in fact constitute "final opinions" of the Board subject to disclosure under the Act's mandatory affirmative provi-

sions.3/ Grumman Aircraft Engineering Corporation v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970).

Following discovery on remand, including a deposition of the Board's Chairman, the District Court held on the basis of the evidence before it that "a final opinion [of the Board] is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereunto" [Pet. App. C, at 40A]. The court further decided, as an issue of fact, that a final opinion of the Board could be, depending on the particular circumstances, either:

3/ 5 U.S.C. §§ 552(a)(2)(A) and (B) provide as follows:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying...
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register [emphasis supplied].

(1) a Summary of Facts and Reasons; 4/ (2) a report and recommendation of a Division of the Board (consisting of three of the Board's five members); (3) a report of a Regional Board; or (4) a Statement of Facts and Reasons.5/

The Board appealed the District Court's conclusion that Division reports and Regional Board reports are in fact "final opinions ... made in the adjudication of cases," claiming as it does here that both types of reports are merely "advisory" and do not ne-

---

4/ Following the District Court's decision on remand, the Board amended its regulations to permit public inspection and copying of such Summaries. 39 Fed. Reg. 13650 (1974). In its brief the Board has neglected to indicate that this amendment was made in an apparent response to the mandate of the District Court. See Pet. Br., at 7-8. In any event, the Board has abandoned its claim that a Summary of Facts and Reasons is exempt from disclosure.

5/ The Court of Appeals in its first decision, 425 F.2d at 579, had already held that a Statement of Facts and Reasons was subject to disclosure under the Act, and the Board has not disputed this holding.

cessarily reflect, in the words of the court below, the "unrecorded and undisclosed reasons" for a National Board decision [Pet. App. A, at 4A]. The Court of Appeals again rejected the Board's contentions, holding that the District Court had correctly concluded that whenever the Board issues a decision without formally disclosing any reasons, the Regional and Division reports explaining the basis for such a decision are necessarily the same as "final opinions".

Furthermore, the Court of Appeals found two additional grounds for affirming the District Court. First, the Regional Boards are "agencies" within the meaning 5 U.S.C. § 552 (a), whose final reports must be disclosed regardless of their relationship to the National Board. Second, even if, arguendo, the documents at issue do not fall within the Act's mandatory affirmative provisions [5 U. S.C. § 552(a)(2)], they are nevertheless "identifiable records" which must be disclosed under 5 U.S.C. § 552(a)(3) and are not covered by any of the Act's exemptions [5 U.S.C. § 552(b)].

Introduction and Summary of Argument

The issue in this case is whether an administrative agency can be permitted to keep secret the reasons for its decisions simply by choosing not to issue formal opinions explaining those decisions. Throughout this litigation the Renegotiation Board has taken the position that Grumman's claim and the decisions of the courts below are based on a

"false assumption that all agencies must write opinions" [Pet. Br., at 21]. This argument misses the point of the case, which is not that a formal opinion-writing requirement must be imposed on administrative agencies, but rather that any documents explaining the reasons for a particular administrative decision must be disclosed when no formal opinion is issued.6/

For many years the Renegotiation Board has functioned in almost total isolation from public scrutiny, neither explaining its decisions nor publishing the criteria for making them. Only as a result of this case has the Board been forced to recognize that its longstanding policy of not issuing formal opinions does not insulate it from a statutory obligation to disclose any document which is the functional equivalent of a final opinion. Whatever label the Board may apply

---

6/ However, the imposition of sanctions by an administrative agency without a cogent statement of reasons raises serious constitutional questions. See United States v. Holby, 477 F.2d 649, 656-57 (2nd Cir. 1973); United States ex rel. Checkman v. Laird, 469 F.2d 773 (2d Cir. 1972); United States v. Broyles, 423 F.2d 1132 (3rd Cir. 1970); United States v. Houghton, 413 F.2d 736 (9th Cir. 1969). See also Joseph v. United States, 405 U.S. 1006 (1972); Fein v. United States, 405 U.S. 365 (1972).

to a particular document explaining a decision reached or a policy adopted, that document must be disclosed under subsections (a)(2)(A) and (B) of the Act. Furthermore, such a document is by definition not exempt from disclosure under subsection (b)(5) just because the agency has labelled it an "advisory report" or a "staff memorandum", since it is the functional equivalent of a "final opinion" or a "statement of policy... which [has] been adopted."7/

The reason for compelling the disclosure of the reports at issue in this case is not obscure. The record amply demonstrates that the Renegotiation Board simply does not want to explain its decisions, preferring instead to enshroud its functions in secrecy and to issue ultimatums to the parties before it. This practice is an intolerable burden on the public, since millions of taxpayer dol-

---

7/ The Court of Appeals explained succinctly and correctly that "the two sections are mutually exclusive. By definition 'final opinions, including concurring and dissenting opinions' cannot be 'inter-agency or intra-agency memorandums'.... Congress in enacting the exemption, did not mean for agencies to refuse disclosure of documents merely on the ground that such documents were customarily circulated only within the bureaucracy" [Pet. App. A, at 12A, 14A].

lars are at issue in every Board decision. Taken to its essentials, therefore, this case turns on the fundamental premise of the Freedom of Information Act that "secret law is an abomination." Stokes v. Brennan, 476 F.2d 699, 702 n. 3 (5th Cir. 1973), quoting K. Davis, ADMINISTRATIVE LAW TREATISE 114, 137 (Supp. 1970).8/ The Sixth Circuit Court of Appeals recently explained this premise in terms pertinent to this case and reflec-

---

8/ See also Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971); Tax Analysts and Advocates v. Internal Revenue Service, 362 F. Supp. 1298, 1310 (D.D.C. 1973), aff'd, ___ F.2d____, (D.C. Cir. August 19, 1974); Vaughn v. Rosen, ___ F. Supp. ____ , Slip Op. at 506 (D.D.C. October 9, 1974), on remand from 484 F.2d 820 (D.C. Cir. 1973), cert denied, ___ U.S. ____ (March, 18, 1974). Compare EEOC v. Los Alamos Constructors, ____ F. Supp. ____ , 43 L.W. 2169 (D.N.M. October 9, 1974)("Those unfortunate enough to be forced into litigation with the government still face agency insistence of trial be ambush.... Appointment to office does not confer upon a bureaucrat the right to decide the rules of the game applicable to his crusades....[I]t seems to be endemic with government employees to say that their agency is in sanctimonious hot pursuit of a Holy Grail which immunizes them from the demands of fair play and the requirement of due process of law....").

tive of the interests of amici:

> One of the reasons for the First Amendment, as well as the Freedom of Information Act, is to promote honesty of government by seeing to it that public business functions under the hard light of public scrutiny. Tennessean Newspapers v. FHA, 464 F.2d 657, 660 (6th Cir. 1972).

Argument

I

THE REGIONAL BOARD AND DIVISION REPORTS ARE FINAL OPINIONS SUBJECT TO DISCLOSURE UNDER SUBSECTION (a)(2) OF THE ACT.

A. Documents on which an agency relies in reaching a final decision must be disclosed.

In Freedom of Information Act cases it is sometimes difficult for courts to draw lines between final agency orders, opinions and policy statements, on the one hand,and predecisional memoranda on the other. This difficulty is created by agencies such as the Renegotiation Board which operate largely in secret and do not voluntarily disclose the reasons underlying their decisions. Under these circumstances it is incumbent upon the courts, as this Court recently pointed out, to employ "the same flexible, common-sense approach that has long governed private par-

ties' discovery" of agency materials in determining what must be disclosed. Environmental Protection Agency v. Mink, 410 U.S. 73, 91 (1973).

When an agency issues an order accompanied by a detailed opinion or explanation, or makes full declaration of policy, there is no need for further disclosure. In Montrose Chemical Corporation v. Train, 491 F.2d 63 (D.C. Cir. 1974), for example, Montrose sought two summaries of evidence developed by agency personnel prior to an administrative hearing. The Court of Appeals held that the summaries were not subject to disclosure, pointing out that the agency had already published an opinion of its final decision concerning the subject matter of the hearing. Emphasizing that the agency had accompanied its decision with the release of voluminous facts and statistics, the court was satisfied that "the factual basis [and] the reasoning behind the final product" had been publicly disclosed [491 F.2d at 68].

In many instances, however, an agency will offer an incomplete explanation or no explanation at all for a decision it has reached or a policy it has adopted. See, e.g., Tax Analysts and Advocates v. Internal Revenue Service, ____ F.2d ____ (D.C. Cir. August 19, 1974), aff'g in part, rev'g in part, 362 F. Supp. 1298 (D. D.C. 1973); Hawkes v. Internal Revenue Service, 467 F.2d 787 (6th Cir. 1972). This is the practice of the Renegotiation Board, which declines

to issue opinions and leaves the parties and the public in the dark about the bases for its final decisions. In cases such as this, therefore, the courts must ascertain what documents the agency in fact relied upon in reaching a decision or adopting a policy so that the documents may be made "available for public inspection and copying" as the functional equivalent of "final opinions" or "interpretations of policy" under subsection (a)(2) of the Act.

The easiest case is presented by an agency which publicly states that it is relying on a particular document or report by incorporating a portion of it into its decision. See American Mail Lines, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969). The reliance principle enunciated in Gulick, however, necessarily applies also to cases in which the agency relies upon a document or report but does not publicly refer to it because it does not publish opinions. In Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971), for example, the Federal Trade Commission had issued a ruling on a proposed merger without offering any explanation or reasoning, or explicitly referring to any reports. The Court of Appeals ordered the District Court to determine which agency documents were "in fact" relied upon by the Commission, on the ground that "private transmittals of binding agency opinions and interpretations" are a form of forbidden "secret law" [450 F.2d at 708]. The court held that the principle of Gulick could not be limited to documents publicly referred to by an agency, but must ne-

cessarily cover any documents in fact relied upon:

> Gulick does not by its express terms require this result, since in that case we relied to some extent on the fact that the agency document containing the reference to the staff memoranda was made public. The result is nonetheless necessary to prevent the development of secret law within the Commission [450 F.2d at 707].9/

A similar analysis was employed by the Ninth Circuit in General Service Administration v. Benson, 415 F.2d 878 (9th Cir. 1969), which held that documents never made public or referred to by the agency were subject to disclosure to the extent that they were in fact "statements of policy and interpretations which have been adopted" within the meaning of subsection (a)(2) of the Act.

9/ The Sterling majority held that documents prepared by the Commission staff and by individual members of the Commission, "most of [which] were written after the Commission's decision" [450 F.2d at 706] [emphasis supplied], would not have to be disclosed "unless adopted by the Commission" [Id., at n. 7]. The dissent in Sterling disagreed with the majority's conclusion that the documents had not been adopted.

B. Regional Board Reports

The courts below correctly applied the "reliance" standard to the decision-making process of the Renegotiation Board and concluded that Regional Board reports are in fact relied upon in making final decisions. The Court of Appeals held that these reports are the functional equivalent of final opinions of the National Board, but that in any case they constitute final opinions of the Regional Boards, which are themselves "agencies" within the meaning of the Act.10/

The Board relies solely on the testimony of its chairman to support its assertion that it neither adopts nor relies upon Regional Board reports in making decisions. The chairman testified that the Board "simply approves or disapproves the clearance [action recommended by a regional board]. It does not adopt any of the memoranda that are before it" [365 F. Supp. at 1149].

10/ Amici adopt the thorough treatment of the question of a Regional Board's status as an agency in the opinion of the Court of Appeals [Pet. App. A, at 3A-13A]. See also, Washington Research Project, Inc. v. HEW, ____ F.2d____, No. 74-1027 (D.C. Cir. September 12, 1974) in which the opinion below, is discussed at length at Slip Op., 11-17.

Neither of the courts below was persuaded by this assertion. The District Court found that a Regional Board report contains the facts and the reasoning for the recommendation made in the report. Since the issuance of an unexplained clearance notice by the National Board is "meaningless", the court concluded that "the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report" [325 F. Supp. at 1153].

The Court of Appeals held that the Board's nomenclature could not determine disclosure under the Act. An agency cannot refuse to disclose documents simply because such documents are customarily circulated only within the bureaucracy. See Bristol-Myers Company v. FTC, 424 F.2d 935, 939 (D.C. Cir. 1970). To the extent that the Board accepts the bottom line recommendation of a Regional Board report without issuing any explanation of its own, that adopted recommendation is meaningless without the calculations and explanations in the rest of the report. Otherwise, "the world is... left in doubt as to either the factual basis or the reasoning behind" the Board's decision, Montrose Chemical Corporation v. Train, 491 F.2d at 68, and the purpose of the Act is thereby circumvented.

C. Division reports

When the Board does not agree with a recommendation of a clearance or agreement prepared by the Regional Board, a division of

the Board composed of three of the five members investigates and writes a report for consideration by the full Board [32 C.F.R. 1472.4 (1972)].

The Board considers the recommendations of the Division and then votes in the case. In those instances where the Board adopts the recommendations, it nevertheless contends in this litigation that only the report's conclusion, but not the report itself, is adopted. This assertion was similarly unpersuasive to the courts below. The District Court concluded from the evidence that a Division Report "represents the reasons why at least a majority of the Board decided clearance should issue. If not specifically adopted by a majority of the Board it at least represents one member's analysis of the issues and reasons for deciding that a clearance should issue and would be a concurring opinion" [325 F. Supp. at 1153].

Division Reports are by definition opinions prepared by agency decision-makers to justify their decisions. The reports are prepared when the Board does not accept the recommendations of the Regional Board. The Division offers a different recommendation with supporting evidence and reasoning, which at the very least becomes a "concurring or dissenting opinion" in the final decision of the full Board, and is therefore subject to disclosure under the express terms of subsection (a)(2)(A) of the Act.

II

REPORTS WHICH MUST BE DISCLOSED AS FINAL OPINIONS ARE NOT COVERED BY THE FIFTH EXEMPTION OF THE ACT.

The Board in its brief has attempted to demonstrate that its Regional and Division Reports are covered by the exemption in the Act for "inter-agency or intra-agency memorandums or letters which would not be available by law to a part other than an agency in litigation with the agency" [5 U.S.C. § 552(b)(5)]. Since this exemption cannot by definition apply to documents subject to disclosure as the "final opinions" of an agency within the terms of subsection (a)(2)(A) of the Act, the court below correctly recognized that it was unnecessary to reach the Fifth Exemption claim in order to uphold the District Court. The exemption is relevant only to the extent that the reports are not "final opinions", but are merely "identifiable records" covered by subsection (a)(3), the catch-all affirmative provision of the Act.11/ Even under the broader "identifiable records" standard, however, the reports are not covered by the Fifth Exemption.

In Environmental Protection Agency v. Mink, 410 U.S. at 91, this Court gave the Fifth Exemption a "flexible, common sense" construction consistent with underlying con-

---

11/ See note 7, supra.

gressional intent "to delimit the exception as narrowly as consistent with efficient Government operation." S. Rep. No. 813, 89th Cong., 1st Sess. (1965), at 9. See also H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), at 10. As the Court pointed out:

> [T]he privilege that has been held to attach to intragovernmental memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be 'injurious to the consultative functions of government that the privilege of nondisclosure protects.' Kaiser v. Aluminum & Chemical Corp., 157 F. Supp. at 946 [410 U.S. at 87].

Documents pertaining to the "consultative functions of government" are necessarily at the opposite end of the administrative process from documents reflecting what the House Report on the Act termed "the end product of Federal administration" [H.R. Rep. No. 1497, at 7]. Documents coming within the latter category are subject to disclosure under the Act precisely because they go beyond the "free discussion of prospective operations and policy," Kaiser Aluminum & Chemical Corporation v. United States, 157 F. Supp. at 947, and reflect the substance and reasoning of administrative decisions already reached.12/

12/ Compare Boeing Airplane Company v. Cog-

In separating the "consultative" from the "decisional" stages of governmental process, it is important to bear in mind that documents generated at the "consultative" stage are not immutably "pre-decisional". What may once have been an advisory memorandum may later become a final opinion; what may at first have been a "trial balloon" may become an adopted policy. Documents privileged at one stage of the decision-making process, therefore, can lose their privileged status at the final stage, since, as this Court indicated in Mink, 410 U.S. at 87, "the privilege that has been held to attach to intragovernmental memoranda clearly has finite limits...." These limits are plainly reflected in the legislative history of the Fifth Exemption. The House Report, for example, states that:

> [A] Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of ... issuing a ... decision. This clause [the Fifth Exemption] is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate secrecy [H.R. Rep. No. 1497, at 10] [emphasis supplied].

---

geshall, 280 F.2d 654, 660-61 (D.C. Cir. 1960) (documents explaining excess profits tax determination by Renegotiation Board held discoverable) with Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327 (D.D.C.), aff'd, 384 F.2d 979 (D.C. Cir. 1966), cert. denied, 389 U.S. 952 (1967)(discovery denied because documents consisted entirely of "pre-decisional opinions, recommendations and deliberations"). See Dorsen and Shattuck, Executive Privilege, the Congress and the Courts, 35 OHIO ST. L.J. 1, 29-33 (1974).

Courts which have construed the Fifth Exemption have applied two principal limitations to its operation. First, as this Court held in Mink, 410 U.S. at 88, "purely factual material" must be disclosed even if it appears in pre-decisional, consultative memoranda, since such disclosure would not have any injurious effect on the giving of pure advice. See also Soucie v. David, 448 F.2d 1067, (D.C. Cir. 1971); Bristol-Myers Company v. FTC, 424 F.2d at 937; International Paper Company v. FPC, 438 F.2d 1349, 1358-59 (2d Cir. 1971).

Second, and of greater importance to this case, the Fifth Exemption does not extend to "final evaluations ... of existing policies" or decisions made, whether or not they contain "purely factual materials". Vaughn v. Rosen, ___ F. Supp. ____, Civil Action No. 1753-72, Slip Op. at 5-6 (D.D.C. October 9, 1974), on remand from 484 F.2d 820 (D.C. Cir. 1973), cert denied, ____ U.S. ____(March 18,

1974). See also Stokes v. Brennan, 476 F.2d at 704. Cf. Tennessean Newspapers, Inc. v. FHA, 464 F.2d at 660. As the District Court explained in Vaughn, this second limitation recognizes that "Exemption 5 was designed to prevent premature disclosure of agency records .... Thus, the line we must draw is between pre-decisional and decisional documents" [Id., Slip Op. at 5][emphasis supplied]. On the exemption side of this line are materials which are purely prospective in nature and unrelated to any decision already made. See, e.g., Washington Research Project, Inc. v. HEW, supra (advisory memoranda of agency staff having no decision-making role);13/ Sterling Drug, Inc. v. FTC, supra (staff produced papers unrelated to existing decisions). In the language of the opinion below these cases all point to "a distinction ... between documents composed exclusively for purposes of assisting policy formulation

---

13/ The opinion in Washington Research Project points out, however, that "the court does not confront a situation in which the underlying information, a summary of which is determined to be exempt, is itself secreted from public inspection,... [where] 'a different result might be reached'" [Id., Slip Op. at 22 n. 20]. That is precisely the circumstance confronting the Court in this case.

and those which serve to reflect policy already made and announced" [Pet. App. A, at 18A]. See generally Note, The Freedom of Information Act and the Exemption for Intra-agency Memoranda, 86 HARV. L. REV. 1047, 1057-61 (1973).

The Regional Board and Division reports at issue in this case reflect final agency decisions already made and announced.

The adopted recommendations of subordinate staff by definition become agency policy. No staff member is personally exposed to public scrutiny when the entire agency stands behind a policy or decision which he participated in formulating. Adopted recommendations of the Regional Boards become Renegotiation Board policy; the Board itself must assume responsibility for documents explaining its policy. Discarded or unheeded advice is, of course, protected from disclosure under this formulation. A staff member playing a devil's advocate role need never defend his conduct in public, while an advisor who advances unacceptable options without "due reflection" need not explain his recommendations publicly.

Finally, the Renegotiation Board argues that release of Division reports will result in unwarranted attacks on Board members. "The possibility that publicly disclosed division reports will be seized upon as a basis for attacks upon their decisions can only lead Board members to be timid in making recommendations" [Pet. br., 26-27]. Board mem-

bers, however, are presidential appointees empowered to issue unilateral orders with respect to the elimination of excess profits [50 U.S.C. App. 1217(a)]. Members, therefore, must expect and even welcome public criticism of their decisions. To suggest that public criticism will always result in timid decision-making is to ignore the realities of public life in our system of government. Public criticism and scrutiny of governmental decision-makers is a necessary fixture of democracy which the Freedom of Information Act was intended to preserve.

Conclusion

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

CAROL A. COWGILL
Consumers Union of
United States, Inc.
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036

MARVIN M. KARPATKIN
1345 Avenue of the Americas
New York, New York 10019

Attorneys for Amici Curiae